No. 41

Supreme Court of the United States

OCTOBER TERM, 1948.

OKLAHOMA TAX COMMISSION,
Petitioner,

VERSUS

MAGNOLIA PETROLEUM COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF MAGNOLIA PETROLEUM COMPANY, RESPONDENT

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November, 1948.

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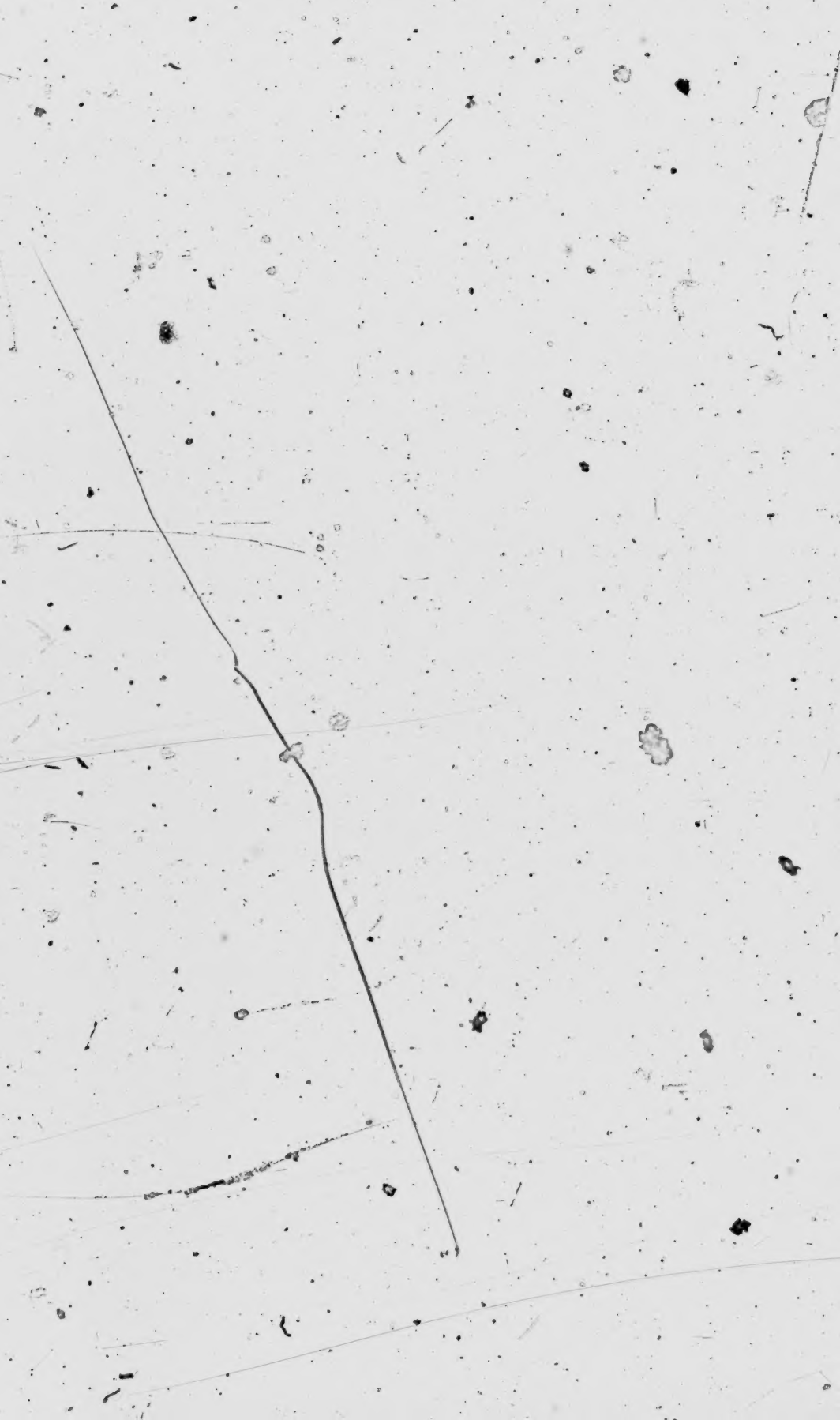

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BRIEF OF MAGNOLIA PETROLEUM COMPANY, RESPONDENT

OPINION BELOW

The opinion of the Oklahoma Supreme Court (R. 30-31) in the Magnolia Petroleum Company case adopts the opinion of that Court in *The Texas Company* case (No. 40). This opinion which is not officially reported is set forth in the appendix to the brief of The Texas Company. The syllabus of the State Court in each opinion is as follows, except as to the Indian tribes named:

"1. A lessee producing oil from lands of restricted Pottawatomie, Apache, Comanche, Otoe and Missouria Indians under departmental lease approved by and

subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state gross production tax of five per cent of the value of the oil produced."

JURISDICTION

The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code, as amended.

QUESTION PRESENTED

The primary question is whether the State of Oklahoma may, in the absence of Congressional consent, impose a gross production tax and a petroleum excise tax (proration) upon the oil and gas produced by a lessee, under a Departmental oil and gas lease, from the restricted lands of Apache, Comanche, Citizen Pottawatomie, and Otoe & Missouria Indians.

STATEMENT

In this case the Oklahoma Tax Commission made four assessments of gross production and petroleum excise taxes against Respondent, who protested same. The four assessments and protests were consolidated by agreement for hearing before the Commission. The pertinent facts with respect to procedure are set forth in Petitioner's brief (pp. 8-10).

The Respondent herein pursued one remedy provided by the State statute (1941 Okla. Stat., Title 68, Sec. 1474; see Appendix I), while the Texas Company, Respondent in Case No. 40, pursued another and additional remedy (1941 Okla. Stat., Title 68, Sec. 1475).

The lands involved in this case fall into three groups with respect to titles.

1. The full blood Indians to whom only trust patents have been issued. This includes most of the lands. It is stipulated the trust periods have been extended to include the period of time involved herein (R. 10).

2. Where, by reason of the death of the Indian allottee, undivided fractional interests are now owned by non-Indians under fee patent, and the remaining undivided interests belong to full blood restricted Indian heirs under the original trust patents. This includes the Kla-da-ing land where an undivided one-fourth (1/4) vested in the heirs of one Mary Moleno, a non-Indian, who inherited from the full blood allottee, and the Pau-Kune land where the allottee devised an undivided one-third (1/3) interest to his non-Indian widow. The remaining interest in each instance descended or was devised to full blood Indian heirs (Stip. R. 7, 8, 14, 15, 17).

3. Where the allottee conveyed her allotment, or a part thereof, by approved non-competent Indian deeds (R. 150-154), pursuant to the Act of March 1, 1907 (34 Stat. 1018, 25 USCA 405), to her son, Horton Homeratha. This, too, is restricted Indian land (Stip., R. 11-13).

The special situations with respect to the undivided one-fourth (1/4) interest in the Kla-da-ing, and the undi-

vided one-third (1/3) interest in the Pau-Kune land are incidental to the principal issue in this appeal. As stressed in the briefs of Petitioner and *Amicus Curiae*, the important question is whether Respondent, in producing oil from *restricted* Indian lands under Departmental oil and gas leases, is an instrumentality of the Federal government and immune from the State gross production and petroleum excise taxes.

SUMMARY OF ARGUMENT

The Respondent, in producing oil from restricted Indian lands under Departmental leases approved by and subject to the supervision of the Secretary of the Interior of the United States, is a Governmental instrumentality and, in the absence of Congressional consent, the oil produced is not subject to the Oklahoma gross production tax of five per cent (5%) of the value of the oil produced, nor the petroleum excise tax of one-eighth (1/8) of one cent (1¢) per barrel (See Petr. Br. Appendix I and II). The decisions of this Court recognizing this immunity have not been overruled, nor are they inconsistent with the subsequent holdings of this Court. The Congress has never consented to subjecting such an instrumentality to taxation, and the Oklahoma Legislature recognizes this established immunity in the very statute levying the gross production tax.

Legal title to the lands herein, except as pointed out in the Statement, *supra*, is in the United States. By virtue of the *trust patents* issued to the Indians pursuant to the

General Allotment Act (Act of February 8, 1887, c. 119; 24 Stat. at L. 388, as amended), the Indians are entitled to the use and benefit thereof during the trust periods. The nature of the Indian's title in his allotted land was described as follows by this Court, in *United States* v. *Rickert*, 188 U. S. 432, 47 L. Ed. 532:

> "* * * In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that sometime in the future, unless extended by the President, he would be entitled to a regular patent conveying the fee. * * *."

ARGUMENT

I.

The State cannot impose a direct tax upon the functioning of an instrumentality of the Federal Government in the absence of Congressional consent.

This basic constitutional doctrine is a fundamental principle of our system of government. Since the leading case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579, this doctrine has rarely been challenged[1].

In *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 70 L. Ed. 1112, this Court said:

> "It is elemental that the Federal government in all its activities is independent of State control. This rule is broadly applied. And without congressional consent no Federal agency or instrumentality can be taxed by state authority."

[1]See, also, **Indian Motorcycle Co. v. United States**, 283 U. S. 570, 75 L. Ed. 1277; **Standard Oil Co. v. Johnson**, 316 U. S. 481, 86 L. Ed. 1611; **United States v. County of Allegheny**, 322 U. S. 174, 88 L. Ed. 1209.

(a) The Respondent, as lessee of restricted Indian lands under a Departmental oil and gas lease, is a Federal instrumentality in its operations under said lease, and the State cannot impose a gross production or petroleum excise tax upon the oil and gas produced.

The State of Oklahoma has endeavored several times to impose these taxes upon the production from restricted Indian lands. Each time this Court has held the lessee to be a Federal instrumentality carrying out the obligation of the United States to these Indians and, therefore, immune from state taxation upon its operations as such an instrumentality. Each time this Court held the gross production and petroleum excise taxes were direct taxes upon the instrumentality and undue interference by the state with the functioning of the Federal Government.[2]

The first attempt involved a gross production tax levied upon coal produced from the land of Choctaw and Chickasaw Indians. The lessee in that case was mining coal from the tribal lands held in trust by two individual trustees "subject to the rules prescribed by the Secretary of the Interior", as the Respondent herein is producing oil, subject to the rules of the Secretary of Interior, but from lands held in trust by the United States. In this case, *Choctaw O. & G. R. Co. v. Harrison* (1914); 235 U. S. 292, 59 L. Ed. 234, this Court held the lessee was an instrumentality through which the United States was performing its obligation to the Indians to open and operate coal mines upon their lands and such an instrumentality was immune from the gross production tax. This Court pointed out that regardless of what the state might call the tax,

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[2]Decisions cited and discussed infra.

it was in reality an occupation or privilege tax directly levied upon a Government instrumentality and invalid.

Soon thereafter the State tried a different approach in an attempt to tax leases upon restricted Indian lands. This time in evaluating the lessee's stock shares for tax purposes the State Board of Equalization considered the oil and gas leases, but this Court denied it the right to do so. *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522, 60 L. Ed. 779. In its opinion reversing the Oklahoma Supreme Court, this Court, citing *Choctaw O. & G. R. Co.* v. *Harrison, supra*, said:

> "The application of the case to that at bar needs no assisting comment. A tax upon the leases is a tax upon the power to make them, *could be used to destroy the power to make them.* * * *.
>
> * * * * * * * *
>
> "It follows from these views that the assessment against the Oil Company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock company, is invalid."

Thus the state was denied the power to do indirectly that which it could not do directly. In reality that is the substance of Petitioner's argument herein; that is, even admitting Respondent is a Federal instrumentality and cannot be taxed in its functioning as such, yet if you call these taxes non-discriminatory and in lieu of ad valorem, you can leave the legal principle untarnished and also collect the tax.

In 1917-1918 the State began an attempt to subject the oil produced from restricted Indian lands to the new

gross production tax. *Howard* v. *Gypsy Oil Co.*, *Howard* v. *Indian Territory Illuminating Oil Co.*, *Howard* v. *Okla. Oil Co.*, and *Howard* v. *Barnsdall Oil Co.*, 247 U. S. 503-504, 62 L. Ed. 1239. In these four cases the lower court enjoined the State Auditor from collecting the tax. This Court affirmed the lower court's action in a single *per curiam* opinion citing *Choctaw O. & G. R. Co.* v. *Harrison*, *supra*, and *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, *supra*.

The theory of the State, in this attempt, is not disclosed by reason of there being only a *per curiam* opinion, however, the case of *Large Oil Co.* v. *Howard*, 248 U. S. 549, 63 L. Ed. 416, decided by this Court in another *per curiam* opinion the same year as the *Howard* cases, *supra*, does reflect its contentions, if we consider the opinion of the Oklahoma Supreme Court in this latter case.[3] As reflected by that opinion, the State contended that, whereas the gross production tax considered in *Choctaw O. & G. R. Co.* v. *Harrison*, *supra*, was not declared to be in lieu of ad valorem taxes, the new tax which it sought to enforce was in lieu of ad valorem taxes, and, therefore, was not prohibited by this Court's decision in the former case. It was also argued that the new gross production tax, being in lieu of ad valorem taxes, was merely a non-discriminatory tax upon the property of the lessee measured by production and not a direct tax upon the lessee's functioning as a Federal instrumentality. This is the same argument Petitioner and *Amicus Curiae* make in the case at bar.

In its opinion the Oklahoma Supreme Court followed this argument, holding that since the tax was only a prop-

[3]See **Large Oil Co. v. Howard**, 63 Okla. 143, 163 Pac. 537.

erty tax upon the private property of the instrumentality and was not laid upon the operations of the instrumentality or upon the lease or any rights or privileges pertaining thereto, this distinguished it from *Choctaw O. & G. R. Co. v. Harrison, supra*, and *Indian Territory Illuminating Oil Co. v. Oklahoma, supra;* and added that the tax was too remote and indirect to be a burden upon the instrumentality.

This Court, in reversing the Oklahoma Supreme Court decision cited, as controlling authorities, the very decisions which had been distinguished. Thus, we must conclude this Court has already passed upon and rejected the argument which Petitioner makes in the case at bar.

There appears to have been no attempt made by the State to subject production from restricted Indian lands to the gross production tax from this decision in 1918 until subsequent to this Court's decision in *Helvering v. Mountain Producers Corporation,* 303 U. S. 376, 82 L. Ed. 907, in 1938.[4] In view of this lapse of time, Petitioner's statement (Br. 19) that Oklahoma did not try to collect ad valorem taxes upon the private property of the lessee (derricks, pumps, pipe, etc.) because it believed "a gross production tax would be paid thereon" is indeed strange. It is stranger still, in view of the statement of the Oklahoma Supreme Court in 1935 in *Barnsdall Refineries, Inc., et al. v. Oklahoma Tax Commission,* 171 Okla. 145, 41 Pac. (2d) 918,[5] that:

"It is now beyond question that the oil and gas leases held by the plaintiffs are governmental instru-

[4] Discussed, infra.

[5] Aff. 296 U. S. 521, 80 L. Ed. 336. State of Okla. ex rel. Tax Commission v. Barnsdall Refineries, Inc., et al.

mentalities and that the State may not impose any tax thereon without the consent of the United States government."

The last cited case is the only one involving the petroleum excise tax in question here. Congress had authorized the collection of the gross production tax upon oil produced from Osage Indian lands (Act of March 3, 1921, 41 Stat. at L. 1249). The Tax Commission, however, undertook to also impose the petroleum excise tax of one-eighth (1/8) of one cent (1¢) per barrel upon this oil. The Supreme Court of Oklahoma, in its opinion, *supra*, held that this was not a property tax but an excise tax bearing no relation to the value of the oil; that it was a tax upon a Federal instrumentality and not within the Congressional consent granted by the Act of March 3, 1921, *supra*. Upon appeal this Court affirmed the decision.[6] Thus, even Petitioner's argument of non-discriminatory property tax is not available to support levying the excise tax upon the production from the restricted Indian leases herein.

(b) The Congress has not waived the tax immunity.

The Congress has not waived the constitutional immunity of the Respondent as an instrumentality of the Government in discharging its obligation to these restricted Indians. In three instances the Congress has, by appropriate legislation, waived this tax immunity as to certain Indians. By the Act of March 3, 1921, *supra*, Congress authorized the State to levy and collect the gross production tax on the oil and gas produced from the Osage Indian

[6]See footnote 5, **supra**.

lands. The Act of May 27, 1924 (43 Stat. at L. 176), waived the immunity as to the gross production tax upon oil produced from restricted lands of the Kaw Indians. The State was granted permission to impose taxes upon the oil and gas produced from the restricted land of the Five Civilized Tribes of Indians (Cherokee, Choctaw, Chickasaw, Creek and Seminole) by the Act of May 10, 1928 (45 Stat. at L. 496). The Act of January 27, 1933 (47 Stat. at L. 777), which imposed certain restrictions upon inherited lands of certain Indians of the Five Civilized Tribes, adopted the waiver of immunity contained in the 1928 Act, *supra*.

Moreover, by expressly waiving the immunity in these instances, the Congress has recognized this Constitutional immunity as an established integral part of the restricted Indian law and policy. Aside from the authorities establishing this general principle that a state cannot impose a tax upon the functioning of an instrumentality of the Federal Government without Congressional consent,[7] this Court has not only held Congressional consent necessary under the circumstances herein, but that any consent given will be strictly construed. In *State of Oklahoma ex rel. Tax Commission* v. *Barnsdall Refineries, Inc., et al., supra*, this Court, speaking through former CHIEF JUSTICE STONE, said:

> "Construing that consent with the strictness appropriate to the interpretation of a waiver of a defined tax immunity, we think the conclusion of the State Court was right."

[7] Cited in footnote 1, **supra**.

(c) The Legislature of Oklahoma adopted the doctrine of constitutional immunity.

In 1925, which was subsequent to this Court's decision in the *Howard* cases and *Large Oil Company* case, *supra*, the Oklahoma Legislature passed an Act relating to the collection of the gross production tax (1925 Okla. S. L., p. 20, Ch. 20), which contained the following provision (Sec. 3):

> "GROSS PRODUCTION TAX—Overpayments.
>
> "Section 3. In all cases of over-payment, duplicate payment or *payment made in error on account of the production being derived from restricted Indian lands and therefore exempt from taxation*, the State Auditor, by and with the approval of the State Board of Equalization, after an audit by the State Examiner and Inspector, is authorized to refund any such over-paid, duplicate or erroneous paid gross production taxes out of any gross production tax funds in his hands from the same county from which the original tax was derived and not apportioned to the State Treasurer to be distributed as provided by law."

This statute, which has never been repealed (See 68 O. S. A. 832; also, 1941 Okla. Stat., Title 68, Sec. 832), clearly declares that oil and gas produced from restricted Indian lands is exempt from the tax. The State Auditor, whose duties have been assumed by the Tax Commission, is authorized to reimburse the taxpayer for such erroneous payments. This statute is not qualified or tied in to a judicial determination of when restricted Indian lands production is exempt. It declares that *it is exempt from the tax*. The apparent purpose of this statute was to adopt the Constitutional immunity which this Court had declared time and

again, and conclude the State's efforts to collect gross production taxes upon production from restricted Indian lands.

Since the Oklahoma Supreme Court held as it did in its opinion herein, it was not necessary for it to consider this statute, even though Respondent quoted the same in its brief in that Court.

(d) Doctrine of immunity not inconsistent with this Court's subsequent decisions.

It is the argument of Petitioner and the *Amicus Curiae* that the decisions relied upon by Respondent are so inconsistent with the subsequent decisions of this Court that the former no longer possess any authority. This argument ignores the essential difference between a tax upon the property of the instrumentality and a direct tax upon the operations or functioning of that instrumentality. This distinction has always been made by this Court in its decisions upon the doctrine, and is the reason this Court has never deemed it necessary to overrule the one line of decisions in order to apply the other. The *Howard* cases, *supra; Choctaw O. & G. R. Co.* v. *Harrison, supra; Indian Territory Illuminating Oil Co.* v. *Oklahoma Tax Commission, supra; Large Oil Co.* v. *Howard, supra;* and *Oklahoma ex rel Tax Commission* v. *Barnsdall Refineries, Inc., et al., supra,* are typical of a tax directly upon the functioning of the instrumentality; while *Union Pacific R. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. Ed. 787; *Alward* v. *Johnson*, 282 U. S. 509, 75 L. Ed. 496; *Taber* v. *Indian Territory Illuminating Oil Co.*, 300 U. S. 1, 81 L. Ed. 463; *Helvering* v. *Mountain Producers Corp., supra; Indian Territory Illuminating Oil*

Co. v. *Board of Equalization*, 288 U. S. 325, 77 L. Ed. 812; and *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, involved taxes on the property of the instrumentality or an indirect and remote burden.[8] This distinction was expressed in the following words by this Court in *Union Pacific R. R. Co.* v. *Peniston*, *supra* (18 Wall. at p. 36):

> "This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent, and a tax upon the action of such agent, or upon his right to be, has ever since been recognized. * * * ."

Recognizing this fundamental distinction, there is no inconsistency between the two lines of decisions. As previously stated, the very fact that this Court has never felt compelled to overrule or question one to apply the other, recognizes the validity of Respondent's position.

Petitioner also relies upon *Helvering* v. *Mountain Producers Corp.*, *supra*, which overruled *Gillespie* v. *Oklahoma*, 257 U. S. 501, 66 L. Ed. 338, and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 76 L. Ed. 815. These two latter cases were considered by the Court to be unwarranted *extensions* of the doctrine of Federal instrumentality immunity. These cases held the net profit or gain derived by the instrumentality from its operations as such to also be immune from taxation. They extended the im-

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[8] **Union Pac. R. R. Co.** case: tax on local property of railroad; **Alward** v. **Johnson**: "Burden laid upon property employed" in connection with transportation of mail; **Taber** v. **Indian Territory Illuminating Oil Co.**: pump, engines, casing, etc., used in producing oil; **Indian Territory Illuminating Oil Co.** v. **Board of Equalization**: Oil in storage; **Helvering** v. **Mt. Producers Corp.**: Net gains derived from State School lands; **James** v. **Dravo Contr. Co.**, **supra**: "The tax is not laid on the instrumentality. Respondent is an independent contractor." Opin. 302 U. S. at p. 149.

munity from the *functioning* to the profit it made from so functioning. In overruling those cases involving *net gains*, this Court recognized the distinction by stating in *Helvering* v. *Mountain Producers Corp.*, *supra*, that the question presented was "whether in a case where the *tax is not laid upon the leases as such*, or upon the government's property or interest, but is imposed upon the *gains* of the lessee," there is such a direct and substantial interference as to require immunity for the lessee's income.

Petitioner also cites the Oklahoma inheritance tax cases, *Oklahoma* v. *United States*, 319 U. S. 598, 87 L. Ed. 1612, and *West* v. *Oklahoma Tax Commission*, Adv. Opin., 92 L. Ed. 1220. The inapplicability of those decisions to the case at bar is demonstrated by the Court's statement (*West* v. *Oklahoma Tax Commission*), that:

> "It is the transfer of these incidents rather than the trust properties themselves, that is the subject of the inheritance tax in question."

The case of *Alabama* v. *King & Boozer*, 314 U. S. 1, 86 L. Ed. 3, cited by Petitioner and *Amicus Curiae*, is in line with the decision in *James* v. *Dravo Contr. Co.*, and similar decisions, *supra*. It is interesting to note that Justice McReynolds, who spoke for this Court in *Choctaw O. & G. R. Co.* v. *Harrison*, *supra*, dissented from the majority opinion in *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 72 L. Ed. 853, which was overruled by *Alabama* v. *King & Boozer*, *supra*. Justice McReynolds in his dissenting took the position that the *Panhandle* case extended the doctrine

of immunity beyond its established scope; hence, may we not conclude *Alabama* v. *King & Boozer* merely reverted to the basic doctrine?

Wilson v. *Cook*, 327 U. S. 474, 90 L. Ed. 793, affirmed this Court's prior decisions[9] that the fact the ultimate economic incidence is upon the Federal Government is not alone sufficient to invalidate the tax. This case involved an attempt by the purchaser of timber upon lands of the United States to extend the doctrine of immunity to include himself as a Federal instrumentality. The Court refused to extend the doctrine but did not question its basic soundness.

The case of *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358, 84 L. Ed. 322, involved interpreting a provision of the Social Security Act (49 Stat. at L. 620, Chap. 531, 42 USCA 1101) and in its opinion this Court said that it was the purpose of the section under consideration "to exclude from this statutory system only well defined and well known classes of employers who have long enjoyed immunity from state taxation." The Respondent herein asserts an immunity which has been recognized for years. This alone distinguishes the cases.

(e) The gross production tax is levied directly upon the functioning of the lessee as an instrumentality of the Government.

Aside from the past decisions of this Court, heretofore cited and discussed, holding the above proposition to

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[9]James v. Dravo Contr. Co., supra, and Alabama v. King & Boozer, supra.

be correct and such tax, therefore, invalid, let us view it from the standpoint of its operation. The amount of the tax is measured solely by the instrumentality's production efforts. The greater the production, the greater the total tax. No tax could be more closely related to and directly upon the functioning of the instrumentality than this tax. The tax is directed squarely at the lessee's production activities and operations under the lease, which is the means employed by the Government to discharge its obligation to develop the land for oil and gas for the greatest benefit to the restricted Indians.

If the excise tax of one-eighth (⅛) of one cent (1¢) per barrel was a direct and substantial burden upon the instrumentality (*State ex rel. Oklahoma Tax Commission* v. *Barnsdall Refineries, Inc., et al., supra*), how much more is this gross production tax, formerly 3% and now 5% of the value of the production, a burden.

(f) Practical operation of the lessee as a Governmental instrumentality.

The doctrine that the Respondent, as lessee, is a governmental agency is not merely a theoretical concept of law. It is soundly based upon fact. The evidence Respondent introduced before the Oklahoma Tax Commission at the hearing was for the purpose of showing that fact. Part of that evidence, which is stipulated to be typical (R. 11, 13, 16, 18) has been included in the record herein (R. 118-150) so that this Court may be advised as to the actual working of this supervised instrumentality.

The oil and gas leases were sold to the Respondent, or its assignors, through the appropriate Indian Agency, pursuant to the "Regulations Governing The Leasing of Restricted Allotted Land for Mining Purposes, Applicable to All Allotted Lands, Except the Five Civilized Tribes and Osage Nation." Code of Fed. Reg., Title 25, Secs. 189.1—189.33 (under the regulations then in effect, but substantially the same). The Government, through the Indian Agency, prescribed the terms of the lease, including the royalty, and accepted or rejected the purchase price bid. If the Respondent wished to acquire a lease from another purchaser at an Agency sale, the assignment was not valid until approved by the Secretary of the Interior. Having obtained the lease, the Respondent then became subject to the "Oil and Gas Regulations Applicable to Lands of the United States and to All Restricted and Allotted Lands (Except Osage Indian Reservation)." Code of Fed. Reg., Title 30, Sec. 221.1-221.67. For convenience the Regulations were included in the record (R. 79-117). These Regulations are not merely directory but mandatory, with penalties for failure to comply. An examination of the index to the Regulations (R. 79-82) alone reflects the fact that the Government is operating these leases through the lessees as its agents.

For instance, if the lessee believes sufficient wells have been drilled to effectively drain the land of oil and that additional wells would be uneconomic, his opinion is not conclusive. The Geological Survey Supervisor may have a different opinion, and if he believes "the interests of the lessor require additional drilling," then he may direct the lessee to proceed to drill additional wells. Reg.

Sec. 221.15 (R. 89). If the lessee fails to do so, the Geological Survey may shut down the lease pending compliance, or recommend cancellation of the lease, or have the work done at lessee's cost with 25% additional to compensate the Government for administrative costs. Reg. Sec. 221.53 and 221.54 (a) (R. 106).

Exhibit "O-1" (R. 118) discloses that the Geological Survey instructed Respondent and other lessees how wells must be plugged and abandoned. The notice itself recognizes that this requirement goes beyond the customary practices of the industry. The notice further reflects that the change was made because the customary practice might result in difficulties if secondary recovery methods were used after primary production. In other words, it was thought that eventually the new required method would be to the greater interest of the restricted Indians, in that ultimate recovery of oil might be increased.

The Regulations require that lessee notify the Geological Survey of virtually anything it proposes to do. The notice, however, is not merely a formality, because the proposed work must be approved before the work is begun. The Exhibits referred to hereinafter show specific instances of working under the Regulations. In Exhibit P-1 (R. 119) Respondent tactfully requested prompt approval, so it could proceed immediately to deepen a well. In Exhibit P-3 (R. 121) Respondent was authorized to deepen Pau-Kune No. 6 and advised that the work would be supervised by one E. M. Pilkington of the Geological Survey. In Exhibit P-10 (R. 123) the Geological Survey authorized Respondent to abandon and plug Pau-Kune No. 4, instructing Respondent to notify it in advance

so that a representative of the Geological Survey could be "present and supervise and witness" the work. In Exhibit 2-6 (R. 134) Respondent had apparently obtained authority to drill deeper or to one formation, but that did not produce, so Respondent obtained permission to test another formation. This demonstrates the detailed supervision of the Government.

An examination of these Exhibits discloses that Respondent did not just get authority to abandon, or drill, or deepen a well, but rather it obtained permission to do the work in a particular manner, using named equipment and materials, including the amount of cement and the size of the pipe. The Respondent could not change its method, material or equipment without obtaining further authority. See, among others, Exhibit P-31 (R. 132).

Petitioner, implying that such regulations are of no importance here, states that compliance with the Rules of the Oklahoma Corporation Commission complies with those of the Department (Br. 42). Merely considering the purpose of the Corporation Commission as set forth in the preamble to the latter rules discloses the vital difference. The pertinent statements in that preamble are as follows:

> "These rules and regulations of the Commission, and all amendments thereto, are designated and adopted for the *conservation of oil and gas*, and to prevent or tend to prevent waste; and *are not to be interpreted as prescribing due care, or want of due care, in oil and gas leasehold operations*; * * * "

On the contrary, the Departmental Regulations, *supra*, are for the very purpose of defining *due care* in the pro-

duction of oil from the restricted Indians' lands. By its Regulations the Department of Interior prescribes and enforces methods of development and operation, which it believes most beneficial to the restricted Indians.

It is submitted that the decision of the Oklahoma Supreme Court herein is correct and that this Court should not reverse its prior decisions in *Choctaw O. & G. R. Co.* v. *Harrison, supra; Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra; Howard* v. *Gypsy Oil Co., supra; Howard* v. *Okla. Oil Co., supra; Howard* v. *Barnsdall Oil Co., supra; Large Oil Co.* v. *Howard, supra;* and *State of Oklahoma ex rel. Tax Commission* v. *Barnsdall Refineries, Inc., et al.,* or its expressions with respect to such a lessee being an instrumentality in *Taber* v. *Indian Territory Illuminating Oil Co., supra; Indian Territory Illuminating Oil Co.* v. *Board of Equalization, supra;* and *Jaybird Mining Co.* v. *Weir, supra.*

2.

Each lease is operated as an entirety and non-Indian ownership of a minor undivided interest did not affect lessee's status as a Federal instrumentality.

As indicated in the Statement herein, *supra*, an undivided one-fourth (1/4) interest in the Kla-da-ing land was inherited by or devised to Mary Moleno, a non-Indian, and the remaining three-fourth (3/4) interest went to restricted full blood Indians. The same is true with respect to the land of Pau-Kune, except one-third (1/3) vested in the non-Indian.

The oil and gas leases under which Respondent produced oil from these lands were Departmental leases, and each lease was necessarily operated as an entirety. It was impossible to do otherwise. The Department of Interior controlled and supervised the operations thereon, irrespective of the non-Indian ownership of an undivided interest. See Exhibits (R. 119-132). In order for the Government to discharge its obligation to the restricted Indians, it continued its control.

It is the contention of Respondent that it continued as an instrumentality because it could not operate the leases, segregating restricted Indians' interests from the lesser fractional interests of the non-Indians.

CONCLUSION

In view of the foregoing authorities of long standing, Respondent submits that the decision of the Supreme Court of Oklahoma is correct and should be affirmed.

Respectfully submitted,

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November, 1948.

APPENDIX

68 O. S. A. Sec. 1474.

APPEAL BY AGGRIEVED TAXPAYER FROM ORDER, RULING OR FINDING OF COMMISSION—NOTICE OF INTENTION—PETITION IN ERROR—RECORD—PAYMENT OF TAXES AS CONDITION PRECEDENT—REFUND—BOND—SCOPE OF SECTION.

Any taxpayer aggrieved by any order, ruling, or finding of the Tax Commission directly affecting such taxpayer may appeal therefrom directly to the Supreme Court of Oklahoma. A taxpayer so desiring to appeal shall, within ten (10) days from the date of mailing to the taxpayer of any such order, ruling, or finding, file with the Tax Commission a written notice of his intention to appeal. Upon request of the taxpayer the Tax Commission shall furnish him an original and copy of the proceedings had in connection with the matter complained of.

Within thirty (30) days from the date of mailing to the taxpayer of the order, ruling, or finding complained of, the taxpayer desiring to appeal shall file in the office of the Clerk of the Supreme Court a petition in error specifying the grounds upon which such appeal is based. At the same time the taxpayer shall file with the Supreme Court the record of the appeal, certified to by the Secretary of the Tax Commission, and consisting of any citations, findings, judgments, motions, orders, pleadings, and rulings, together with a transcript of all evidence introduced at any hearing relative thereto, or such portion of such citations, findings, judgments, motions, orders, pleadings, rulings, and evidence as the appealing parties and the Tax Commission may agree to be sufficient to present fully to the Court the questions involved.

As a condition precedent to the right of the taxpayer to prosecute such an appeal, and as a jurisdictional prerequisite of the Supreme Court to entertain such appeal,

it is specifically provided that, if the appeal be from an order, judgment, finding or ruling of the Tax Commission, assessing a tax or an additional tax, penalties, and interest, the taxpayer shall pay to the Tax Commission the amounts assessed. Any amounts so paid shall, pending the final determination of the appeal, be held by the Tax Commission in a segregated fund, and if, upon a final determination of the appeal the order assessing such tax, penalties, and interest is reversed or modified and it is determined that said tax or part thereof was erroneously assessed, said amounts so paid by the taxpayer, together with the interest thereon at the rate of three per cent (3%) per annum, shall be refunded to the taxpayer by the Tax Commission.

In lieu of the cash payment provided for in the preceding paragraph the taxpayer may file with the Tax Commission a bond in double the amount of the tax, additional tax, penalties and interest so assessed, conditioned that he will faithfully and diligently prosecute such appeal to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, will pay such tax, additional tax, penalties and interest, and costs so assessed against him.

If the appeal be from an order, judgment, finding or ruling of the Tax Commission other than one assessing a tax and from which a right of appeal is not otherwise specifically provided for in this Act, any aggrieved taxpayer may appeal from any such order, judgment, finding or ruling as provided in this Section, and may supersede the effect of such order, judgment, ruling, or finding by filing with the Tax Commission a bond in an amount fixed by the Tax Commission payable to the State of Oklahoma conditioned that such appeal will faithfully and diligently be prosecuted to a final determination, and

in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, that such person will immediately conform thereto.

This Section shall be construed to provide a legal remedy by action at law in cases where any tax, or the method of collection or enforcement thereof, or any order, ruling, finding or judgment of the Tax Commission are complained of, or are sought to be enjoined in any action in any court of this State or the United States of America. Laws 1939, p. 381, Sec. 26.